IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-882

Supreme Court, U. S.
FILED
NOV 14 1975
MICHAEL RODAK, JR., CLERK

LEONOR ALBERTI DE CANAS
and MIGUEL CANAS,

Petitioners,

v.

ANTHONY G. BICA
and JUAN SILVA,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

PETITIONERS' RESPONSE TO BRIEF OF RESPONDENT

BURTON D. FRETZ
MICHAEL L. STERN
ROBERT B. JOHNSTONE
California Rural Legal
Assistance, Inc.
P.O. Box 425
Santa Maria, California 93454
(805) 922-4563

ROBERT S. CATZ
HOWARD S. SCHER
Urban Law Institute
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

RALPH SANTIAGO ABASCAL
California Rural Legal
Assistance, Inc.
1900 K Street, Suite 103
Sacramento, California 95814
(916) 445-3041

Counsel for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-882

LEONOR ALBERTI DE CANAS
and MIGUEL CANAS,

Petitioners,

v.

ANTHONY G. BICA
and JUAN SILVA,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

PETITIONERS' RESPONSE TO BRIEF OF RESPONDENT

---

1. WHETHER THE FEDERAL GOVERNMENT HAS OCCUPIED THE FIELD OF IMMIGRATION LAW MISCONCEIVES THE ISSUE HERE.

Respondents predicate their attack of § 2805 of the California Labor Code (hereinafter "§ 2805") on the

assumption that the California law is a law to regulate immigration. To the contrary, § 2805 merely uses federal immigration law definitions to effect local labor policy but does not disturb federal determinations concerning who may enter the United States and on what terms and conditions entry may be made. Section 2805 precludes the knowing employment of *only* those persons, defined by federal law and federal administrative practices (see 8 Cal. Admin. Code § 16209), as not authorized to work in the United States.

A previous determination by this Court held that a different California labor statute which precluded wage forfeiture and arbitration was not to be considered a law regulating national securities exchange even though it might actually conflict with ancillary provisions of the Securities Exchange Act, 15 U.S.C. § 78(f). *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 130, 134-136 (1973). Similarly, this Court held that a state trade secret statute which conflicted with various aspects of federal patent law was not invalid because it was not a law regulating patents. *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 370, 493 (1974). Accordingly, § 2805 cannot be considered a law regulating immigration merely because it makes use of immigration law concepts. In short, because § 2805 does not regulate immigration, the question whether the federal interest in foreign affairs confers on Congress an exclusive power to regulate immigration is not, and need not be, at issue here. Cf. *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum.L.Rev. 623, 637 (1975).

Respondents consistently misinterpret the scope of California Labor Code § 2805 by neglecting to read § 2805 in accordance with the implementing regulations

issued by the California Labor Commissioner. The California Labor Commissioner's regulations under § 2805, Title I, Cal. Admin. Code, Pt. 1, Ch. 8, Art. 1, § 16209-16209.6, totally incorporate federal standards regarding the classification of aliens.[1]

According to the labor regulations, the definition of "lawful resident" under § 2805 includes non-immigrant aliens and any other person lawfully admitted to the United States. Specifically, the regulations define the term "lawful resident" in § 2805 to include any non-citizen who possesses any document issued by the "Immigration and Naturalization Service which authorizes him to work." 8 Cal. Admin. Code § 16209. In the event that a prospective employee claims to be a citizen (or lawfully admitted) but does not possess documentation proving such status, he may sign a declaration to that effect and exonerate, if necessary, an otherwise innocent employer. 8 Cal. Admin. Code § 16209.3. These California regulations thus incorporate the same standards used by the United States Department of Labor.

Consequently, the respondents' objection that § 2805 is vague and overbroad (p.4, Respondents' brief) with regard to the definition of "aliens entitled to lawful residence" is illusory. Intimations that petitioners have "erroneously reduced" the term "aliens not entitled to lawful residence" to "illegal aliens" cannot stand in view of the specific definition articulated by the California Labor Commissioner which, in fact, legitimates petitioners' use of the term "illegal aliens." The

---

[1] The Regulations of the California Labor Commission, 8 Cal. Admin. Code, § 16209-16209.6 are reproduced as Appendix "A."

California regulations accept and incorporate federal law defining those aliens not entitled to lawful residence but who are nonetheless entitled to work in the United States. The California Labor Code § 2805 only reaches those not lawfully "present" and not entitled to work according to federal standards.

Accordingly, respondents' efforts to demonstrate that federal classifications of aliens who are permitted employment, pursuant to provisions of 8 U.S.C. § 1101(a) somehow invalidate § 2805 are likewise inappropriate (p.9, Respondents' brief). Section 2805 would not prohibit these legally-authorized aliens from working. Nor would Vietnamese refugees admitted to this country, pursuant to 8 U.S.C. § 1182(d)(5), be barred from employment in California. Any alien legally admitted to the United States and authorized to work by the federal government would not be deprived of the right to work through the exercise of § 2805.

Moreover, respondents' charge that the determination of "adverse effect" under § 2805 would be ambiguous (p.4, f.n.7, Respondents' brief) is invalid. That contention is also refuted by the California Labor Commissioner's reference to the federal standards, which results in California's retention of federal definitions and standards in interpreting the term in California's regulations. 8 Cal. Admin. Code § 16209.6.

In contrast to the Immigration and Nationality Act, the purpose of § 2805 is not to establish an independent definition of the immigration status of aliens, nor to impose any burdens on persons lawfully admitted to the United States. In short, the state statute does not define who may enter the United States or upon what terms. More accurately, § 2805

extends federal law to remedy a local labor problem to effectuate the legitimate interest of California in protecting its labor.

Respondents mischaracterize the test used in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), as the exclusive test for determination of federal occupation of a field. However, *Pennsylvania v. Nelson, supra,* did involve identical state and federal laws. In *Nelson,* the Court invalidated a state sedition law which operated in tandem with the federal government's Smith Act (itself a sedition law). The Court grounded its decision on a potential conflict involving the possibility of multiple and inconsistent adjudications if both the federal and state statutes were allowed to stand. Hence, absent an indication of congressional intent to occupy the field, the Court took note of the administrative and substantive problems engendered by two identical statutes covering the same conduct. The Court thus resolved the potential conflict between the two systems by enunciating the preemption of the state statute because of the possibility of incompatible adjudications under the two statutes.

The case at bar is distinguishable from *Nelson*. While *Nelson* involved a potential conflict between two systems aimed at regulating identical behavior (sedition), the instant case involves federal and state statutes in two (2) different fields–immigration and labor. Moreover, Congress does not condone the behavior which the California statute prohibits. Therefore, the two statutes do not compete or even potentially conflict. Rather, they operate in different domains. The federal statute is directed toward regulating immigration and the state statute toward regulating employers and

employment. Consequently, the facts of the instant case are totally distinguishable from the *Nelson* case. In sum, because Congress neither condones nor specifically condemns the employment of aliens not entitled to lawful residence (the subject of § 2805), the principle of *potential conflict* between competing federal and state systems has no application here.

Furthermore, the test used in *Pennsylvania v. Nelson* was redefined and narrowed substantially in *Goldstein v. California*, 412 U.S. 543 (1973). In *Goldstein*, it was declared that state law was not to be preempted by federal law unless (1) the state law was "absolutely and totally contradictory and repugnant"; (2) involved a matter "necessarily national in impact"; and (3) subject to a conflict which would "necessarily arise." 412 U.S. at 544. The California statute, scrutinized in accordance with the *Goldstein* test, must stand. The statute governs only a local labor problem and does not in any manner reshape or reformulate immigration law or policy, and does not prevent, or present an obstacle to the full operation of federal immigration law and policy.

The respondents misconstrue § 274(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1324(a)(3) as an indication of congressional intent to protect the employers of illegal aliens. Neither the statute on its face nor its legislative history support respondents' claim that § 2805, by prohibiting the knowing employment of illegal aliens, conflicts with § 274(a)(3). The respondents argue that § 2805, by prohibiting the knowing employment of illegal aliens, conflicts with federal law which provides penalties for concealing or harboring illegal aliens. The single federal statute which

respondents argue poses a potential conflict is § 274(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1324(a)(3). It provides that any person who:

> *willfully* or *knowingly conceals, harbors or shields* from detection ... any alien ... not duly admitted ... or not lawfully entitled to enter or reside within the United States ... shall be guilty of a felony ... (Emphasis added).

To prevent the interpretation that employment *per se* would constitute a crime, Congress added a provision to § 274(a)(3):

> Provided, however, that for the purpose of this section, *employment* (including the usual and normal practices incident to employment) *shall not be deemed to constitute harboring.* (Emphasis added).

This proviso, while exempting employment *per se* from the crime of "harboring", does not purport to grant a general exemption from criminal or civil sanctions for employers of illegal aliens. While there has been no specific judicial interpretation of the term "harbor" in § 274(a)(3), an examination of the legislative history demonstrates that the congressional intent was to protect the *innocent* employer from prosecution. According to Senator Kilgore, the author of § 274(a)(3):

> So am I (trying to strengthen the immigration bill), but at the same time I am trying to do it, not at the expense of some man who *unwittingly* or *unknowingly* hires a man he does not know to be a wetback, who may be pretty well into the interior of the country, and who is seeking employment. 98 Cong. Rec. 794 (1952). (Emphasis added)

The legislative history and congressional intent, therefore, do not support respondents' claim that:

> It is thus clear that Congress addressed itself squarely on the issue of employment of aliens not entitled to lawful resident and declared that it was not unlawful. (Respondents' brief, p. 17).

On the contrary, § 274(a)(3) indicates no more than congressional silence regarding a prohibition of *knowing* employment of illegal aliens. It does not express an intent to protect knowing employment of illegal aliens either on its face or in the legislative history. Nor does it express congressional intent to preempt the states from enacting legislation regarding the employment of illegal aliens. Section 2805 recognizes that knowing employment of an illegal alien results in a subversion of the federal regulatory scheme: the conflict posed by respondents is illusory insofar as § 2805 does not conflict with § 274(a)(3) but in fact furthers the purpose of federal law.

Finally, consideration of the bulk of pertinent federal law repudiates any finding of conflict between § 2805 and federal law. Not only does the state statute harmonize with and effectuate the purposes of the federal immigration and related federal labor statutes, but it incorporates the same standards used by the federal government in interpreting § 212(a)(4) to determine when a foreign worker may be admitted to work in the United States. Finally, the effects of § 2805 harmonize with federal law by discouraging the employment of, and illegal entry by, persons not lawfully entitled to presence in the United States. This result complements, not conflicts with, the effect of various federal laws regulating employment and dis-

semination of federal services in denying services and benefits to persons illegally in this country. (See Social Security Act, 45 C.F.R. § 233.50: eligibility limited to citizen and lawfully resident aliens). Ultimately when an alien is not entitled to be in the United States, by definition, such alien is not entitled to work in the United States.[2] When a state law, such as § 2805,

[2]The Court of Appeal of the State of California recently adopted such reasoning in *Alonzo v. State of California Department of Human Resources*, 123 Cal.Rptr.536 (1975) when it upheld the State's denial of unemployment compensation benefits to an illegal alien. The California court rebutted Alonzo's claim that he was entitled to be legally present in the country and thus legally available for employment. The *Alonzo* court held:

> If an alien is here unlawfully, he has no rights under the Constitution of the United States to equal opportunity of employment as enjoyed by lawfully resident aliens (citations omitted) and has no right to work. *Id.* at 540.

Pertinent case law supports the view that employment of aliens is only protected where the alien's presence in the country is lawful. *Truax v. Raich*, 239 U.S. 33, 39 (1915); *Graham v. Richardson*, 403 U.S. 365 (1971). Similarly, the *Alonzo* court found that it was the intent of Congress that citizens and lawful resident aliens be entitled to work in those jobs surreptiously held by illegal aliens. *Id.* at 543. Moreover, the policy of the United States Employment Service of the Department of Labor in administering services is to accept only applications from legally qualified applicants. (20 C.F.R. § 601.1). *Id.* at 544. In sum, on the basis of federal law, congressional intent and federal practice, the *Alonzo* court found:

> A fortiori an individual illegally in this country cannot legally be qualified to work here. *Id.* at 544.

It is manifestly clear that the reasoning supporting *Alonzo* supports our position here. The key factor in the cases is the ascertainment of the alien's legal status pursuant to a state law

prohibits the knowing employment of an illegal alien, the broader purposes of federal law—the exclusion of illegal aliens, is clearly furthered by such state legislation.

---

not otherwise involving classifications of aliens. Furthermore, the interest of the State of California in the well-being of its economy and labor force is identical in both cases. As a result of *DeCanas* and *Alonzo*, the California Court of Appeal has articulated a dual legal standard: one for illegal aliens and one for their employers. *See*, dissent of Judge Thomson in *Alonzo. Id.* at 546-47.

CONCLUSION

For the above reasons, the decision below should be reversed.

Respectfully submitted,

ROBERT S. CATZ
HOWARD S. SCHER
Urban Law Institute
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

BURTON D. FRETZ
MICHAEL L. STERN
ROBERT B. JOHNSTONE
California Rural Legal
Assistance, Inc.
P.O. Box 425
Santa Maria, California 93454
(805) 922-4563

RALPH SANTIAGO ABASCAL
California Rural Legal
Assistance, Inc.
1900 K Street, Suite 103
Sacramento, California 95814
(916) 445-3041

*Counsel for Petitioners**

November 1975

*Counsel are indebted to Karen Buck and Daniel Forman, members of the Antioch School of Law, Washington, D.C., class of 1976, for their able assistance in the preparation of this brief.

APPENDIX A

1. California Administrative Code, Title 8, part 1, Chapter 8, article 1 § § 16209 through 16209.6:

16209. DEFINITION OF ALIEN ENTITLED TO LAWFUL RESIDENCE.

An alien entitled to lawful residence shall mean any non-citizen of the United States who is in possession of a Form 1-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorized him to work.

16209.1 INQUIRY OF APPLICANT FOR EMPLOYMENT.

In ascertaining whether an applicant for employment is not entitled to lawful residence in the United States, an employer shall, contemporaneous with the hiring, make inquiry of such applicant as to whether he is a citizen or an alien.

16209.2 INQUIRY OF EMPLOYEE.

In ascertaining whether an employee is not entitled to lawful residence in the United States, an employer shall make inquiry of such employee as to whether he is a citizen or an alien.

16209.3 APPLICANT OR EMPLOYEE CITIZEN.

If the applicant for employment or employee claims to be a citizen, he may be employed or continued in the employ of the employer upon signing a declaration

under penalty of perjury that he is a citizen of the United States. An employer who knowingly employs an alien not entitled to lawful residence shall not be exonerated from prosecution for violation of Labor Code Section 2805 notwithstanding his having obtained a signed declaration of citizenship from the alien.

16209.4 APPLICANT ALIEN – REQUIREMENT OF PROOF.

If the applicant acknowledges that he is an alien, he shall be requested to produce a document which shows that the applicant is entitled to lawful residence in the United States. A document such as specified in Section 16209 shall be sufficient proof of lawful resident status. The applicant shall furnish such documentation within three days from the day of employment. In the event that he fails to furnish such documentation and employment is nevertheless continued and he is found to be an unlawful resident, the employer shall be presumed to have had knowledge of the employee's unlawful resident status.

16209.5 EMPLOYEE ALIEN – REQUIREMENT OF PROOF.

If the employee acknowledges that he is an alien, he shall be requested to produce a document which shows that he is entitled to reside in the United States. A document such as specified in Section 16209 shall be sufficient proof of lawful resident status. The employee shall furnish such documentation within three days. In the event that he fails to furnish such documentation and employment is nevertheless continued and he is found to be an unlawful resident, the employer shall be presumed to have had knowledge of the employee's unlawful resident status.

16209.6 DEFINITION OF ADVERSE EFFECT.

Employment of an alien not entitled to lawful residence under any of the following circumstances shall be deemed to have an adverse effect on lawful resident workers:

a. Employment in any category of employment not enumerated on Schedule A in Labor Department Regulations 29 CFR § 60.6 Schedule A may be obtained from the Manpower Administration, U.S. Department of Labor, Washington, D.C.

b. Payment by an employer to such employee of less than the federal or state minimum wage, whichever is higher.